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Bank Deposits and Collections

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BANK DEPOSITS AND COLLECTIONS.

II.

DEPOSITS OF COMMERCIAL PAPER.

In the first portion of this paper it has been shown that the character of a deposit is determined by the contract made between the bank and its customer. It now remains to point out the various conditions of fact and combinations of circumstances which are useful in ascertaining the true character of the contract when the subject of the deposit is commercial paper, as drafts, notes, or cheques.

As with money deposits, it is no less possible that the parties should intend, and, therefore, should agree that the title to the paper deposited should pass to, and become the property of, the bank. If this is so the result is exactly that of the general deposit of money.[53] On the other hand, a legitimate business purpose is served if they intend the depositor to remain the owner, and the bank to become a mere agent for him to collect the money due thereon from the persons primarily or secondarily liable to pay it.

One of these two general situations will invariably be intended, and actually result, although it is, of course, possible that each should be slightly varied. The character of the contract is, therefore, limited to one or the other of these possibilities. No clearer statement of the principle has been found than that in a recent Indiana decision. "When a cheque is indorsed by the payee (or holder) and placed in a bank other than the one on which it is drawn, the question as to whether the transaction constitutes a sale of the cheque or whether it amounts to a deposit of the cheque for collection, depends upon the facts and circumstances attending the transaction."[54]

As in all problems of construction, the express terms arranged by the parties must be given complete operation in so far as they are not opposed to public policy, sound morals, or positive legisla-

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[53] The rationale of this transaction has been stated, note 19 supra, see p. 129 of December issue.

[54] Downey v. Nat. Exch. Bank (Ind. 1911) 96 N. E. 403, 404, per Lairy, C. J. See annotation of this case in 60 Univ. of Pa. L. Rev. 452. This question of fact is for the jury. In Fayette Nat. Bank v. Summers (1906) 105 Va. 689, 54 S. E. 862, the following charge was approved: "If the jury shall believe from the evidence that the parties, at the time the cheque was received and deposited, intended that the same should be treated as cash, then (it shall be treated as a general deposit). But if the jury believe from the evidence that the cheque was intended by the parties to be deposited merely for collection (then the title thereto remained in the depositor)."

tive enactment.[55] Thus evidence of conversation between the depositor and the bank's agent is admissible if not contradictory of written evidence.[56] The best evidence, of course, is a written contract. This may be found in a letter of instruction accompaning the cheque,[57] or by written arrangements made beforehand,[58] or in a notice printed in the depositor's pass-book,[59] or upon the deposit slip;[60] and, in one case, it was formulated from the terms of a placard hung in the banking house.[61] The cases cited show that these will be given their due effect, once properly construed. The construction of such contracts or terms cannot be entered into here. The following is typical; "This bank in receiving cheques or drafts on deposit, or for collection, acts only as your agent, and beyond carefulness in selecting agents at other points and in forwarding to them, assumes no responsibility."[62] Mr. Justice MITCHELL construed this to mean that all paper deposited was received by the bank only as an agent to collect, and not as vendee. Beyond due care in selecting correspondents and forwarding to them, he said the entire risk of collection was on the customer, and only when the proceeds were actually received by the bank did it unconditionally assume the relation of debtor for the amount. This matter of construction seems not quite so simple as it was treated. It is true the stipulation is to be given some effect, yet it has a full field of operation although it is not considered conclusive on the question whether the transaction is a sale or a deposit for collection. It fully outlines the extent of the bank's liability when the first question, which is the one we are here discussing and which was in issue in that case, has been once determined and it is found that the bank is an agent and not a vendee.

[55] Story, Bailm. (9th Ed.) § 10, 33. "The maxim of our jurisprudence is, 'Modus et conventio vincunt legem;' and it applies to all contracts, not offensive to sound morals or to positive prohibitions of the legislature."

[56] Boyd v. Emmerson (1834) 2 A. & E. 184; California Nat. Bank v. Utah Nat. Bank (C. C. A. 8th Cir. 1911) 190 Fed. 318 (a decision on a slightly different point but illustrating the predominating influence of express stipulation); Smith v. Nat. Bank of Mills & Co. (C. C. Cal. 1911) 191 Fed. 226 (verbal statements),

[57] Commercial Nat. Bank v. Armstrong, Recr. (1893) 148 U. S. 50, Morris Co v. Alabama Carbon Co. (1903) 139 Ala. 620; Armstrong Recr. v. National Bank (1890) 90 Ky. 431.

[58] Idem.

[59] Brown v. People's Bank (1910) 59 Fla. 163, 52 So. 719; Marine Bank of Crisfield v. Stirling (1911) 115 Md. 90, 80 Atl. 736; In re State Bank (1893) 56 Minn. 119, 57 N. W. 336; King v. Bowling Green Trust Co. (N. Y. 1911) 129 N. Y. S. 977.

[60] Falls City Woolen Mills v. Louisville Nat. Banking Co. (1911) 145 Ky. 64, 140 S. W. 66; King v. Bowling Green Trust Co., supra.

[61] Wingate v. Mechanics' Bank (Pa. 1848) 10 Barr 104. The depositor was allowed to put in evidence the terms of the placard to show what the contract between the parties really was; and this without preliminary proof that he had read the placard, or acted upon the faith of it. This may be considered a doubtful decision.

[62] In re State Bank, supra.

The stipulation then protects the bank from liability for the defaults of others to whom it is necessary to entrust the paper for actual collection, and maks them agents also for the depositor. In this view, the stipulation seems still to leave open the question of sale or agency. The authority of this learned judge is, of course, very great, and yet it would not seem advisable to urge the adoption of this exact pass-book notice in order to insure the transaction being considered an agency to collect by the courts.

A notice which seems less open to similar objections is the following, "On out-of-town cheques this bank is only to be held liable when the proceeds and actual funds or solvent credits shall have come into its possession."[63] This clearly indicates that no absolute liability is imposed upon the bank until collection is actually made. It is therefore inconsistent with a sale, wherein the bank becomes at once the owner of the paper and the depositor immediately entitled to his purchase price, his liability, in case the cheque is not paid, being merely that of an indorser. In one case, the simple statement appeared on the deposit slip, "all items credited subject to final payment."[64] It was held to establish an agency to collect and not a sale. Other forms may be found which have been passed upon by the courts.

The practical lesson to be drawn from these cases is obvious; in attempting to state expressly the terms of the contract upon which the bank receives paper from its customers, care should be used to see that the notice printed or published, or the express arrangements made, are certain and clear, putting the question beyond all doubt, and thus saving litigation and delay. This is not difficult, and the surprise is that this easy method of avoiding trouble has not been utilized more frequently and with greater precision. There appears to be no doubt that a notice printed in the pass-book is binding alike upon bank[65] and depositor.[66] It is always wiser to anticipate and provide against difficult questions of this kind, than, after the

[63] King v. Bowling Green Trust Co., supra.

[64] Falls City Woolen Mills v. Louisville Nat. Banking Co., supra.

[65] In Marine Bank of Crisfield v. Stirling, supra, two bank books in which were printed extracts from the corporate by-laws were admitted on behalf of the depositor to show the conditions on which the deposit could be withdrawn.

[66] Brown v. Peoples' Bank, supra, clearly recognizing that such conditions are binding. See also cases cited in Notes 52, 53 and 55, supra, to same effect.

In the ordinary cases, the entries in a bank book of the amounts of deposits, are not conclusive either upon the bank or the depositor. 1 Morse, Banking (4th Ed.) § 292 et. seq., but there is a clear distinction between the amount of deposits, where errors and misstatements may easily occur, and the terms of the contract entered into by the parties. Where such conditions appear in the pass book, and yet the depositor desires additional or different terms, and the bank is willing to accede to his desire, it is a simple matter to draft a special agreement to cover the particular transaction.

insolvency of the bank, to be forced to litigate in court the question of title to the paper.

When no express terms of the contract, like those just discussed, appear from any of the writings forming part of the transaction, and when no verbal contract has been made, it may be found that particular business or banking customs or usages prevail in the locality, and that an attempt will be made by one party or the other to have these put in evidence to determine the contract made by the parties. It may be safely said that no evidence of a custom will be received which is not sufficiently clear and certain to put the terms and particulars of the custom beyond doubt.[67] Equally is it true that the burden of establishing the existence of the custom is upon the party who seeks advantage from it as part of his case.[68] When the custom relied upon is alleged to be a general custom, though general only to a particular business, as the banking business, the party offering it in evidence must lay grounds by establishing the fact that it is actually general and not local.[69] But when a custom has been shown to be general, it seems to have been frequently considered admissible, to form part of the contract, though it has not been, and probably cannot be, shown that the party against whom it is sought to introuce it, had any notice or knowledge of its existence,[70] with the additional proviso that the custom or usage must be considered reasonable by the court.[71] However, this merely means that if the custom be really sufficiently established as of general character, there is a presumption that it is known to the customer.

[67] This is no more than the ordinary rule applicable to the admissibility in evidence of any custom or usage. Thus where the witnesses examined as to the custom differ with reference thereto, the custom will not be applied, i. e., is not admissible. Herr v. Tweedie Trading Co. (C. C. A. 2nd Cir. 1910) 181 Fed. 483. See Dec. Dig. Tit. Customs and Usages, sec. 19. And, of course, a custom cannot prevail over an express term of the contract. Bowell v. Draper (1910) 149 Ia. 725, 129 N. W. 54; Jones, Evid. (2nd Ed.) 585.

[68] Dingley v. McDonald (1899) 124 Cal. 682, 57 Pac. 574; Ohio Oil Co. v. McCrory (1896) 14 Ohio Cir. Ct. 304.

[69] Auto & Accessories Mfg. Co. v. Merchant's Nat. Bank (1911) 116 Md. 179, 81 Atl. 294, though a custom may exist and be well known in Baltimore, it does not bind nor affect one making a deposit in Indianapolis, in the absence of evidence that it was really general.

[70] Jefferson County Sav. Bank v. Commercial Nat. Bank (1897) 98 Tenn. 337; Holder v. Western German Bank (1905) 132 Fed. 187.

[71] Though a general custom is known to the depositor, if it is not reasonable, he does not contract with reference to it. Farley v. Pollock (1905) 145 Ala. 321; Pinkney v. Kanawha Valley Bank (1911) 68 W. Va. 254, 69 S. E. 1012, reviewing cases. This is universally true, so further citations are not necessary. However, with reference to customs bearing upon the present problem of sale on agency, upon deposits of paper, it seems that a custom showing the usage to be either way, would be reasonable. It is not like the unreasonable usage of sending paper to the drawee thereof as subagent to collect from itself.

Thus it is said, "Before evidence of a custom or usage can be received, it must appear that there exists a usage established long enough to have become generally known, and to warrant a presumption that the contract in question was made with reference to it, and that the usage is uniform in reference to the business and localities involved in the inquiry;"[72] and "the party sought to be bound must either have actual knowledge of its existence or the usage must be so general and well known in the community, as to give rise to the presumption of such knowledge."[73] If the latter is true, the customer is not heard to deny the actual knowledge; his self-interest is too evident to make his statements trustworthy.

But where the custom is local only, out of cautiousness, the courts have refused to regard the parties as contracting with reference to it, and intending to make it part of their agreement, unless the depositor is shown to have had actual knowledge of it.[74] Where this is not done, evidence of the custom is not admissible, no matter how much local strength it may have.[75]

One prominent authority states that usage may be received in evidence to decide the question if the law of the jurisdiction has not been already settled by judicial determination, but if so, it will exclude any evidence of a custom to subvert it.[76] Of course, it is true that custom will not make legal that which the law says is illegal, as, for example, in the criminal law. But in the absence of express agreement, the court is left to imply just what parties meant to be their contract, and if a prevailing custom is sufficiently proved, say to indicate the transaction to be a sale, there is no reason why it should not prevail, though in the absence of such custom the court would, under precedents, be bound to hold it an agency or *vice versa*. The law has not condemed as illegal anything that may be claimed by the custom, but has said that, in the absence of express contract or other and sufficient evidence, the contract will be presumed to be agency. The custom is, upon general principles, such other evidence and tends to show what the parties, contracting with reference to known or general reasonable customs intended it to be a part of their contract. Upon authority, it does not seem that Mr. MORSE's position can be successfully maintained. In the case last cited, the evidence of a custom, being local, was excluded only because it was not shown to have been known to the depositor, yet

[72] Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank, supra.

[73] Smith v. Nat. Bank of Mills & Co. (C. C. Cal. 1911) 191 Fed. 226; Moore v. United States (1904) 196 U. S. 166, 25 Sup. Ct. 202.

[74] Bank of Commerce v. Miller (1902) 102 Ill. App. 224.

[75] Brown v. Peoples' Bank, supra.

[76] 1 Morse, Banking (4th Ed.) § 270 et. seq.

its purport would have been to contradict the rule the court would have applied in the absence of express terms or of competent usage.[77]

The conclusion seems accurate, therefore, that a deposit of paper is made with reference to competently proved customs and usages in the banking business, and that evidence of the same is admissible in a proceeding to determine whether the contract is one of sale or of agency. But in the absence of an express contract, and of custom, the court must still struggle with the same problem of building up a contract for parties who neglected to state their intentions in an intelligible way. This is the bare case, stripped of all collateral facts, but it is important to note that it remains a question of fact in ascertaining the contract made. Custom and usage must still influence the court, and it is largely from these that the rules have been developed, but they are not so defined and are not offered in evidence. They, therefore, are now spoken of as rules of law. They are rules, it is true, but only because they are now crystalized customs, a not infrequent parentage of legal principles.

In discussing these cases, it will be found convenient to consider the paper deposited in respect to whether it is immatured "time" paper, or sight, demand, or matured "time" paper, or a cheque. It is thought that in dealing with the respective classes, different considerations have different degrees of importance, for it is evident that several circumstances, probably all of some probative force, may appear in a single case, and perhaps tend to neutralize each other. It becomes necessary in such a case, to give them their proper relative weight.[78]

Time Paper.

When paper which has not yet matured is deposited in a bank, it may perhaps be said that it will be presumed to have been taken for collection. Lord ELLENBOROUGH, in a leading case, said: "Every man who pays bills not then due into the hands of his banker, places them there, as in the hands of his agent, to obtain payment of them when due.[79] If this is the case, and the bank subsequently becomes bankrupt, having the bills entrusted to it remaining in specie in its hands, they do not pass to the trustee in bankruptcy, but continue the property of the customer.[80] When, from special agreement or other circumstances in the case, this

[77] See also, to the same effect, Wootters v. Kauffman (1887) 67 Tex. 488, 494.

[78] For an excellent illustration of the manner in which the court will regard such a case, see opinion of Mitchell, J., in Re State Bank, supra.

[79] Giles v. Perkins (1807) 9 East 12; followed in Dawson v. Isle [1906] 1 Ch. D. 633.

[80] Zinck v. Walker (1777) 2 W. Bl. 1154; Grant, Banking (6th Ed.) 209.

presumption is overthrown, and the bills are seen to have been practically sold to the bank, they cannot be reclaimed by the customer, but he may prove only as a general creditor.[81]

It is believed, however, that with respect to undue bills, if the paper is taken for any other purpose than collection, as that the bank in effect purchases it, there will be sufficient evidence appearing to make that fact so reasonably clear that it will be beyond the range of great difficulty. There are only the two main possibilities, the sale and the agency to collect. Since a sale of immatured paper is really a discount,[82] evidence that discloses a discount of the paper is proof that it was sold to the bank and not taken for collection.[83] If the discount is made out, title to the paper passes to the bank,[84] and the customer is entitled to receive the discount value at once, or to have it placed to the credit of his account.[85] In either case he is a creditor.[86]

It is, therefore, necessary to determine what constitutes proper evidence of a discount. Indorsement of undue paper has been

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[81] Ex parte Sargent (1810) 1 Rose, 153; Ex parte Atkins (1884) 4 M. D. & D. 103; Ex parte Barkworth (1858) 2 De G. & J. 194.

[82] Grant, Banking (6th Ed.) 282, "The discounting of a bill of exchange may be defined as a purchase of the bill by the banker for a price which is less than the amount of the bill by the sum agreed to be paid for the discount."

Taylor v. Vossburg Mineral Springs Co. (1911) 128 La. 364, 54 So. 907, where a bank takes a bill of exchange at a fixed valuation arrived at by deducting, from the amount called for on its face, the discount and the exchange, and credits the depositor with the balance, the bill becomes the bank's property. See also, Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank (1911) 116 Md. 179, 81 Atl. 294.

[83] Idem, 284, "Where the banker discounts a bill for a customer, giving him credit for the amount of the bill, and debiting him with the amount of the discount, there is a complete purchase of the bill by the banker, in whom the whole property and interest in it vest, as much as in any chattels he possesses." Accordingly, should the banker fail subsequently, the assignees would be entitled to the bill and not the customer, who would be a mere general creditor. Carstairs v. Bates (1812) 3 Camp. 301.

[84] Giles v. Perkins, supra. Following the statement quoted in the text, Lord Ellenborough says, "If the banker discount the bill or advance money on the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for the advance (respectively)."

[85] Grant, 282, "The transaction is completed by crediting the customer with the value of the bill, and debiting him with the discount." It is, of course, the same to credit him only with the discount value, thus making the deduction for the discount before anything is placed on the books. The other method, merely as a matter of bookkeeping, makes a more complete record of the bill.

[86] That the customer is a creditor, does not mean that the bank is such a holder of the paper for value, that it is free from equities of the maker or acceptor against the customer, although without notice of them. No actual value has been given, as yet, by the bank. Of course, if the bank pays the discount value to the customer, it becomes a holder for value; or if he is already indebted, there is value in most jurisdictions. But it seems that the mere placing of proceeds to his credit against which he may draw does not constitute value until actually drawn against. For a discussion of this problem, see article, "When is a Bank the Bona Fide Holder of a Cheque left for Deposit or Collection," by Albert S. Bolles, Esq., in 47 Univ. of Pa. L. Rev. 375.

said to be *prima facie* evidence of an intention to discount,[87] but it is clear that property in the bills, although indorsed and handed to the banker to be eventually discounted, does not pass until they are actually discounted.[88] The strongest evidence of a discount will be the form and character of the entry made of the transaction on the books of the bank. No effort can be made to discuss the various forms used by bankers in different countries and localities to show a discount, but in general, it appears clear that if the amount of the *face* of the paper is entered to the credit of the customer, as cash, it is not a discount. It seems essential to such a transaction that the bank should deduct a percentage for the time the paper has yet to run, in order to arrive at the purchase price, and where that has not been done the inference is that no discount, and therefore no sale, was intended. On the contrary, it indicates that the paper was intended to be taken by the bank for mere collection. Although it may have been entered to the credit of the customer's account, and a right to draw upon the same extended to him, the fact that the *whole* face value has been credited to him, points strongly to the fact that it was not intended on the one hand to sell, and on the other to buy, the paper. The entry to his credit is convenient, for it enables the bank to keep trace of the paper before collection, and when collected necessitates no new adjustment of the accounts between the parties, which, instead, have been settled by one entry. The right to draw is not inconsistent with an agency for collection. As pointed out by Lord ELLENBOROUGH, if the right is taken advantage of by the customer, the bank is fully protected by a lien on the paper. If it collects the bill, the advances are repaid out of the proceeds; if not collected, the customer is responsible to the bank as for money lent, and cannot have the bill to pursue parties liable thereon until repaying the bank. Finally, the crediting of the face value is totally inconsistent with a discount or purchase. A bank does not pay the face value for paper which has some time to run; if such an unusual transaction were assented to by the bank and intended by the customer, that fact would

[87] Ex parte Twogood (1812) 19 Ves. 229, per Lord Eldon, "Indorsement though prima facie evidence, is a fact not considered inconsistent with a mere deposit (for collection); but it must be clearly established, tnat notwithstanding indorsement the object was a mere deposit."

But indorsement appears to be used in the cases as make-weight. It is not sufficient to overcome the more general presumption that undue paper is taken for collection and remains the property of the customer. In Giles v. Perkins, supra, the paper was indorsed. Lord Ellenborough held there was no discount. Ex parte Peace (1812) 19 Ves. 25, 51.

[88] Dawson v. Isle [1906] 1 Ch. 633. If, prior to the discounting the banker has advanced to the customer, he has a lien on the bills for that amount. Ex parte Schofield (1879) 12 Ch. D. 337.

invariably be made clear, either by written evidence other than the mere form of the entry, or by conversation between the parties. The case would then be determinable on the basis of the express contract, and no room would exist for implication.

The conclusion, therefore, seems justifiable that the fact of discount or no discount is to depend upon the character of entry to the credit of the customer. Clearly if entered "short" as paper by the bank,[89] it creates an agency; if entered as paper of any form, though along with cash, equally it is an agency.[90] If entered not as paper but as cash, the question is more difficult, but the authorities are conclusive that this will not alone change the title to the paper, although the customer may have a right to draw.[91] Thus it is said, "It is hardly to be supposed that, by entering the full amount in the cash column of the account, the banker intended to debit himself presently with the *whole sum* to be received in the future on the bills. In order to change the property, it must be shown that the banker bought the bills or discounted them; then the customer might have immediately sued the banker for the price which the banker had agreed to give for the bills, but still retained in his hands,"[92] Quoting from a leading text, "If it had been intended that the bills should become the property of the banker, they would have been entered as cash, deducting the discount."[93]

A discount thus appears to be a transaction which is not usually difficult to trace, and which when once discovered has a clear and indubitable effect so far as concerns the ascertainment of the implied contract of the parties. This is in accord with what has already been said, that if the contract with respect to immature paper is not one of agency, there will be in this case sufficiently clear evidential facts to render the proper construction of the intention comparatively simple. This evidence is the discount; with it, the transaction in all cases which have been found, is a sale; without it, an

[89] Grant, Banking (6th Ed.) 209 Nd., for explanation of "short" entry.

[90] Thompson v. Giles (1824) 2 B. & C. 422. This is a leading case on time paper. The bills, etc., were entered at their full value in the cash column but were entered as bills or paper. Interest was allowed on the account; upon cash from the date of deposit; upon the bills, from date due and paid. It was held that the title remained in the customer, although it was shown to be the custom to use the bills before collected as the bank might please. This was regarded as a reasonable course, justified in many cases by the condition of the customer's account when before collection, he had drawn against the credit given him for the bills. This was followed in Ex parte Barkworth (1858) 2 De G. & J. 194.

[91] Giles v. Perkins, supra; Hughes v. Spooner (1819-24) cited and approved 2 B. & C. 422, 425, 431.

[92] Thompson v. Giles (1824) 2 B. & C. 422, 431, 432, per Holroyd, J.

[93] Grant, Banking (6th Ed.) 214. In Second Nat. Bank v. Cummings (1891) 89 Tenn. 609, 18 S. W. 115, Justice Lurton relied strongly upon the fact that drafts had not been discounted to show title had not passed to the bank.

agency to collect, the title and risk remaining in the customer.[94] Where a sale is the result, the deposit is general, with all the incidents of that kind of a deposit; where an agency is created, the deposit is specific, and the rights, duties, and obligations of the parties depend upon the contract they may make as a code to govern their relationship, or in the absence of that, upon such terms as usage, either as such, or as it has been converted into rules of law, shall determine. This is of course, a branch of the law of agency, and not within the scope of the present undertaking.

Matured Paper.

Matured paper includes demand and sight paper and therefore, for the present purposes, cheques. In this class of deposits, it is more difficult to determine whether the bank accepts the paper on general deposit or for collection. The fact that the entry in the bank's books is for the face value of the paper has no weight because the usual price paid for creditable matured paper, if sold, is its face value. Discounts do not appear and the simple expediency of looking at the entries cannot be relied upon to dispose of the problem. That is, new evidential points must be found from which to gather the parties' intention when no express arrangement has been made, and usage is not sufficient to govern the case.

Now it is clear that though no complete express contract has been made to put the case beyond all doubt, yet enough may appear tending to show the contract, from which the intention may be deduced. Custom or usage attaches to that which does thus appear, and quickens it to real meaning, so that the court is able to construct the contract from the fragments the parties have provided. This appears to be the real situation with respect to the present problem. The fragments which most frequently aid the court in this case are the character of the indorsements, the fact of credit and the retention by the bank of a right to cancel that credit if the cheque is not paid. These particular facts may appear singly, or two or more may be found in one case, when they may point to the same, or to different results, in which case they must be weighed against each other.

As in the case of deposits of undue paper, where the transaction presumptively creates a bailment or agency to collect, the late Dean AMES has taken the view that, in all cases of deposits of matured paper, the prima facie rule should also be that the bank becomes a mere agent for its customer and not a debtor.[95] An

[94] For an annotation of cases on this subject, see 60 Univ. of Pa. L. Rev. 331.
[95] Ames Cas. Tr. (2nd Ed.) 10 N. 2.

attempt will be made to see how far this view has been taken by the courts, and what effect has been given to the evidential matters referred to in the preceding paragraph.

There are two general classes of cases, and it will be necessary to view each separately. The matured paper or cheque which is the subject of the deposit may either be drawn upon the bank of deposit itself, or upon a different bank. In either case, the bank is entitled to receive the cheque or not as it pleases, just as it might refuse to allow anyone to become its customer. It may, therefore, receive the paper upon whatever conditions or terms it chooses to stipulate.[96] If none are stipulated, the question of construction of the contract again arises. This applies equally to both classes of cases.

In considering the case with reference to deposits of cheques of which the depositary is also drawee, amidst any doubt that exists, several things seem clear. The primary problem is, the cheque being received, whether the bank takes it as agent of the holder to collect it from itself, or as agent of the maker or drawer to pay it from his account. That is, in this class of case, instead of the inquiry being as to agency or *sale,* it is to agency or *payment,* since it is almost impossible to conceive of a bank purchasing a cheque drawn upon itself and not certified, whereas no incongruity arises from an acceptance of it as and for payment, but, instead of handing the money over the counter to the holder, giving credit to his account.

Prima facie, the bank of deposit which is also drawee, is treated as the agent of the depositing customer to make the collection.[97] Although this is the presumption, it does not seem to have much resisting strength. It may be removed by but little additional evidence, falling short of an express agreement. Thus if the bank retain the cheque unreasonably long, it is the equivalent of payment, and the bank cannot thereafter be heard to say that the drawee had

[96] 2 Morse, Banking (4th Ed.) § 569. No suggestion seems ever to have been made that a banker is engaged in public service or under any duty to accept the business of all who apply. No more is the bank bound by its agreement with a depositor to pay all cheques he may draw, but only in so far as he has credit to his account not otherwise appropriated. And irrespective of the state of his account, a holder of his cheques is not entitled to sue the bank for payment thereof if not certified. Mr. Morse's proposition is therefore clear.

[97] Boyd v. Emmerson (1834) 2 A. & E. 184. In this case the cheque was not credited to the depositor, nor cancelled, nor charged to the drawer's account which was already overdrawn. The court held that, in the absence of any express direction, etc., the bank, under these circumstances, was entitled to consider the cheque presented to it, not as an agent to the drawer for present payment, but as the depositor's agent to collect with reasonable diligence. The same principle seems to have been recognized in Kilsby v. Williams (1822) 5 B. & Ald. 815. Oddie v. National City Bank (1871) 45 N. Y. 735.

not sufficient funds.[98] In what is by far the most frequent situation it will be found that not only has the bank received, without express arrangement of the terms thereof, a cheque drawn upon itself, but it has also proceeded to credit the amount of the customer turning it in. When that has been done, by the great weight of authority, the transaction does not make the bank the agent of the depositing customer to collect the cheque, but it constitutes payment of the cheque, and the customer whose account it credited is entitled to claim absolutely that amount if he has not himself been guilty of fraud.[99] The credit to the account appears to be the equivalent of payment, just as if the bank had handed the amount of it to the holder, who had then replaced that cash in the bank upon general deposit to his account.[100] Thus either the actual payment of money, or the giving of credit to the depositing customer, closes the transaction as between him and the bank, unless the paper is not genuine to his knowledge or he has been guilty of other fraud.[101] The act of crediting, in the absence of special agreement or prevailing custom, concludes the bank although it is subsequently discovered that the account of the drawer of the cheque is already overdrawn, or is otherwise insufficient to justify the payment of this cheque.[102]

Mr. MORSE has thought that the cases in Pennsylvania have announced a different rule: in effect, that the crediting of a cheque drawn on the same bank to the account of the depositor, is to have no more force to show it was not taken for collection as agent for the depositor than would the same act if the cheque were drawn on an entirely different bank.[103] The principal case cited for this decides merely that if the depositing customer knows that the drawer's

[98] Grant, Banking (6th Ed.) 54.

[99] Bolton v. Richard (1795) 6 T. R. 139; Downey v. Nat. Exchange Bank (Ind. 1911) 96 N. E. 403 (see cases cited). The cases in the next note are to the same effect.

[100] "The giving of credit is practically and legally the same as paying the money to the holder and receiving the cash again on general deposit." City National Bank v. Burns (1880) 68 Ala. 267; People v. Sheppard (N. Y. 1899) 37 App. Div. 119; People v. St. Nichols Bank (N. Y. 1894) 77 Hun. 159; Levy v. Bank (Pa. 1802) 4 Dall. 234.

[101] Oddie v. National City Bank (1871) 45 N. Y. 735.

[102] Wasson v. Lamb (Ind. 1889) 22 N. E. 729, "So where a bank credits a depositor with the amount of a cheque drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money. Nor can the bank recall or repudiate the payment, because, upon an examination of the accounts of the drawer, it is ascertained that he is without funds to meet the cheque, though when the payment (or credit) was made, the officer making it labored under the mistake that there were sufficient funds."

Accord, Chambers v. Miller (1862) 13 Com. B. N. S. 125; National Bank v. Burkhardt (1879) 100 U. S. 686.

[103] 2 Morse, Banking (4th Ed.) 572, citing Peterson v. Union National Bank (1866) 52 Pa. 206, and Foulkner v. Union Banking Co. (1878) 6 W. N. C. 109. It is believed that a careful examination of the second case will show that it deals with an entirely different question, and in no way involves a deposit of cheques in the drawee bank.

account is overdrawn or insufficient, it is such fraud on his part that, though the bank has received the cheque and credited his account fully, he cannot claim the cheque to have been paid, throwing the loss on the bank. This single statement appears in the opinion of Mr. Justice STRONGE to justify the learned author's conclusion, "It is manifestly impossible for the officers of a bank to keep in memory the state of each depositor's account." But the decision was entirely rested upon the fraud of the depositor, involved in his own knowledge of the insufficiency of funds, a question which was said to have been properly put to the jury. If the position contended for by Mr. MORSE is supportable, there would have been no need to rely upon this species of fraud. By his rule the bank would have been entitled to cancel the credit given on discovery of the state of the drawer's account. The above quotation, therefore, has reference only to the proper belief of the court that the depositor could not ask the bank to incur the risk of the state of that account when he himself had complete knowledge that it was insufficient.[104]

It may, therefore, be concluded that by the current of authority, the effect of crediting the account of the depositor with a cheque drawn upon the depositary itself, is entitled to great weight as tending to show that the cheque is received by the bank, not as an agent of the depositor to collect, but as agent of the drawer to pay, and really constitutes payment and makes the bank a debtor at once to the depositor. Thus the payment of such a cheque is the equivalent of the sale of a cheque on another bank, and is therefore a general deposit.[105] In event of the failure of the bank thereafter, the depositor may prove only as a general creditor, and cannot recover the cheque to sue the drawer, (his debtor) thereon. He has no action against the drawer, for the cheque is paid. In this event, it seems the position of the depositor is less fortunate than if the cheque had been received by the bank for collection, for then, on the bank's insolvency, it might have recovered in specie.[106] However, it would be difficult to weigh the advantages to the depositor, if the bank remained solvent, and the cheque is considered paid, it is well enough, and none has any advantage. The bank may proceed to charge the drawer's account, and if insufficient, may sue him as for money lent, if solvent. But suppose the drawer becomes insolvent. The depositor is then in a much better position than if the cheque had been taken for collection merely, because, though the account were sufficient, after

[104] Note the reference to the depositor's good faith in the quotation contained in note 102, supra.

[105] See rationale applicable to this situation in note 19, supra.

[106] Thompson v. Giles, supra.

insolvency the bank could not pay it.[107] He would then be compelled to prove against the insolvent's estate. But if the check may be considered paid, he is paid in full and looks to the bank, while the latter proves for the dividend. It thus appears that the depositor's choice between collection and payment can only be intelligently expressed in a particular case if he is able to foretell whether the bank or the drawer, his debtor, is about to become insolvent. However, in perhaps most cases, since he cannot forecast such a matter, the holder of the cheque will prefer to risk the solvency of the bank in which he already expresses his confidence from the fact that he keeps his own deposit there, rather than that of the debtor. Accordingly, the rule stated above depending upon the crediting of his account, works out the usual desire of the depositor.

From the standpoint of the bank, the matter is different. The rule with respect to the effect of crediting such cheques places upon the bank the burden of constant vigilance in inspecting the state of all its customers' accounts, not only daily, but in case of small balances, on active accounts, many times daily. In one case, which has always been considered a leading authority, it was said that the bank had the means of this knowledge always at hand, and therefore if it, in effect, elects to pay the paper it voluntarily assumes the risk of securing itself out of the drawer's account or otherwise.[108] This, in its practical working out, requires a bank to which a cheque upon itself is presented, to do one of three or four things; to make an express stipulation that the cheque, though credited, is taken only as an agent for collection; or to refuse to credit it until, delaying its counter transactions, the account of the drawer is examined; or to go through the extra motions, in what is already a business of vast detail, of carrying the cheque on special memorandum until the examination is made; or to incur the risk, at all times, of knowing the exact state of each account. While under the first alternative the bank is given a ready solution of the problem, there would appear to be certain practical difficulties with it, else it would be utilized in more cases. The other alternatives are too serious to be accepted without doubt. This particular phase of the subject seems one singularly in need of proper legislative action.

While these rules seem to be well settled, in the absence of considerations of greater weight in the determination or implication of the contract of the parties, yet they are only rules of construction, and hence give way to any express arrangements, or may even be

[107] Yardley v. Fourth St. National Bank (1897) 165 U. S. 634.
[108] Oddie v. National City Bank, supra.

subservient to a sufficiently proved and known usage, in so far as any conflict occurs. In the Pennsylvania case discussed above, the rule placing the risk of the drawer's account upon the bank if the cheque was credited to the depositor, was recognized as a real burden, and one that a depositor could not ask it to assume if he had not himself acted in perfect faith with reference to that exact matter. Likewise, in California, evidence of a local custom in San Francisco allowing the bank to cancel the crediting of such a cheque if the drawer's account was subsequently discovered to be sufficient, was admitted and given effect to uplift the well established rule, and hence, to allow the bank to allege its initial mistake and to protect itself, although the drawer was insolvent.[109]

Upon this branch of the subject we then find that the presumptive rule advocated by Dean AMES does exist, and, in connection with the weight of evidential facts to rebut the presumption, that the effect of crediting the depositor's account with such a cheque is by far the most important element in determining the contract which the parties have made, but that this evidence is itself subject to certain other counterbalancing evidence.

The most frequent question is with respect to the deposit of paper drawn upon other banks or individuals. It has been seen that with reference to time paper, the character of the entry in the books is the most important evidential point; and as to sight paper or cheques drawn on the bank of deposit, the fact of crediting the customer's account. It is not surprising therefore that one circumstance should stand out most prominently with respect to matured paper drawn on another bank or individual. From an examination of the cases it appears that the character of the indorsement placed upon the paper by the depositor when he hands it to the bank, has perhaps the greatest weight in the determination of the contract made between himself and the bank. But it is not to be supposed that in all cases this circumstance is conclusive or binding, nor that it may not be over-balanced by other matters in particular instances. Since the question deals with the passage of title, and title to commercial paper is most frequently transferred by indorsement and delivery, it is not unnatural that the character of an indorsement should give the best indication of the intention with respect to that question. An indorsement may or may not pass title to commercial paper, according to the intention of the parties, and the qualifications or restrictions which they place upon the indorsements will be the best evidence of their intention.

[109] National Gold Bank v. McDonald (1875) 51 Cal. 64.

Thus, indorsement "for collection,"[110] or "for collection and credit,"[111] or "for collection for the account of,"[112] all clearly indicate that the owner of the paper intended to make the bank his agent to collect the paper from the persons liable thereon, and the bank in accepting it so marked must be taken to have assented to the establishment of that relation between them. An indorsement "collect and return,"[113] or "collect and remit,"[114] or the like, has a similar meaning and, for this purpose results in the same legal relation. And it has been held that the indorsement, "pay to any bank or banker or order," is restrictive and does not pass title to the paper, but merely

[110] Commercial National Bank v. Armstrong, Recr. (1893) 148 U. S. 50; Evansville Bank v. German American Bank (1895) 155 U. S. 556; First Nat. Bank v. Bank of Monroe (1887) 33 Fed. 408; Beal v. Somerville (1892) 1 C. C. A. 598 (obiter); Lawrence v. Stonington Bank (1827) 6 Conn. 521; Freeman v. Exchange Bank (1891) 87 Ga. 45, 13 S. E. 160; Fay v. Strawn (1863) 32 Ill. 295; Claflin v. Wilson (1879) 51 Iowa 15; Freeman's Nat. Bank v. Nat. Tube Works (1890) 151 Mass. 413; Cecil Bank v. Farmer's Bank (1864) 22 Md. 148; Locke v. Leonard Silk Co. (1877) 37 Mich. 479; Reading v. Beardsley (1879) 41 Mich. 123; Third National Bank v. Clark (1877) 23 Minn. 263; Tecumseh Nat. Bank v. Best (1897) 50 Neb. 518; Branch v. United States Bank, Id. 470, 474; Dickerson v. Wason (1872) 47 N. Y. 439 (obiter); National Bank v. Hubbell (1889) 117 N. Y. 384; National Citizen's Bank v. Citizen's Nat. Bank (1896) 119 N. C. 307; Blaine v. Bourne (1875) 11 R. I. 119; Akin v. Jones (1893) 93 Tenn. 353.

Accord, Rock County National Bank v. Hollister (1875) 21 Minn. 385 ("pay bank or order for collection"); Mechanics' Bank v. Valley Packing Co. (1875) 70 Mo. 643 ("pay bank or order for collection for the account of A"); United States Natl. Bank v. Geer (1898) 55 Neb. 462, 75 N. W. 1088 ("For Account").

In First Nat. Bank v. Bank of Monroe, Supra., Wallace, J., says: "When paper is delivered to a bank for collection, the banker becomes the customer's agent to make collection, with authority to pass the proceeds to the customer's account by a credit when they are collected; and he undertakes the duty of an agent for all the purposes of making the collection."

However, though the indorsement be in this restricted form, where the cheque is taken in pursuance of an understanding and dealings between the parties, whereby it is credited and treated as a cash deposit subject to cheque at once, the ordinary rule is abrogated by this special and express contract, if sufficiently proved, and the title passes. Ayres v. Farmer's Bank (1883) 79 Mo. 421, Bullene v. Coates (1883) 79 Mo. 426; Midland Nat. Bank v. Roll (1894) 60 Mo. App. 585.

[111] Idem; 2 Bolles, Banking 524; Morris & Co. v. Alabama Carbon Co. (1904) 139 Ala. 620; Armstrong, Recr. v. National Bank of Boyertown (1888) 11 Ky. L. Rep. 90; Bank of America v. Waydell (1907) 187 N. Y. 115.

Ayres v. Farmer's Bank (1883) 79 Mo. 421, and Bullene v. Coates, Id. 426, are cited in Ames Cas. Tr. p. 11, as contra, but though the indorsement in these cases was "collection and credit," there existed a clearly proven contract between the parties that the cheques should be placed to the credit of the depositor's account as soon as received, and not merely when collected, and that there should be an immediate right to draw. It seems, therefore, doubtful whether these cases can be considered contra.

[112] Tyson v. Western Nat. Bank (1893) 77 Md. 412, 26 Atl. 521.

[113] Bailie v. Augusta Savings Bank (1894) 95 Ga. 277.

[114] Philadelphia Bank v. Dowd (1889) 38 Fed. 172 (semble); Hutchinson v. Nat. Bank of Commerce (1906) 145 Ala. 196; Harrison Works v. Coquillard (1887) 26 Ill. App. 513; Nat. Ins. Co. v. Mather (1905); 118 Ill. App. 491; Midland Nat. Bank v. Brightwell (1899) 148 Mo. 358; People v. Dansville Bank (N. Y. 1886) 39 Hun. 187; White v. Bank (1901) 60 S. C. 122; Bank v. Weems (1888) 69 Tex. 489.

authorizes the collection of the instrument.[115] Likewise, an indorsement, "pay bank or order, for the account of," indicates that the contract between the bank and its depositor does not effect a sale, but a mere specific deposit for collection.[116]

These cases bear out the rule stated, that the bank, upon this transaction, is presumptively an agent for collection. Being mere rules of presumption, the effect of the indorsement may be overcome by other circumstances and of course by express contracts contemplating a different result, as is illustrated by the two Missouri cases cited in the notes. The intention of the parties is then made clear from their express agreement, and the intention to be gathered from the character of the indorsement is thus either affirmed or negatived, and which ever it may be, must be given full effect. It is none the less true that these forms of indorsement indicate that the depositor did not write his name *animo indorsandi,* and with the full intention of giving to the bank all the rights of an indorsee, and assuming himself all the liabilities of an indorser. On the contrary, the indorsement only purports to be for a particular purpose, which is not the passage of title to the bank, but, as it itself states, that the paper may be collected. No clearer evidence seems possible that the contract offered by the customer and accepted by the bank was to establish the relation of principal and agent to collect, and that they did not contemplate the immediate creation of a debt.

When the paper is not indorsed in any of the above forms, nor in one that can with reason be said to fall within the same purport, but, on the contrary, is indorsed in an equivocal manner, so that in itself it does not give any real light on the intentions, greater difficulties are encountered. Although Dean AMES has considered the indorsement "For Deposit" to be the same in effect as "For Collection,"[117] there is some reason to question whether it does express the same idea or intention, or even whether it may be considered equivocal. As the rationale of the deposit of paper has been explained, it seems at least reasonable that the parties might have had

[115] Bank of Indian Territory v. First Nat. Bank (1904) 109 Mo. App. 665, 83 S. W. 537.

[116] Armour Packing Co. v. Riley County Bank (1883) 30 Kans. 163. Brewer, J., holds further that such an indorsement is a contract in writing and not subject to contradiction by parol, drawing a distinction therein between a blank indorsement and an indorsement written out in full as is this.

In Lynn Nat. Bank v. Smith (1882) 132 Mass. 227, the indorsement was the same. The point at issue was the right of the bank to maintain an action on the cheque against the drawer. The court after allowing the action, said "The words 'for the account of' merely indicate the relations between the bank and the depositer. At the most they show that the note was indorsed in blank, not upon a valuable consideration, but for collection." The case was treated throughout as an agency for collection.

[117] Ames Cas. Tr. p. 11.

practically that situation in mind when the customer indorsed "For deposit." Expressed at length, the two words may mean that they contemplate the immediate purchase of the cheque by the bank and a deposit of the purchase price to the customer's general account, the bank at once becoming a debtor to him.

By Dean AMES, the indorsement "For Deposit" is expressly connected with that "For Collection" and it is said, "the bank is presumptively not a debtor until the paper is paid."[118] The cases cited in support of this are all small cases wherein the indorsement was "For Collection," and not "For Deposit." An examination of other cases indicates that the weight of authority is against this statement.[119]

From these decisions, it seems that this form is given a different interpretation from the indorsements which have been discussed above. It is true that in most of the cases mentioned, and which can be found, there were other elements in the transaction which also had their force in determining the result, as the fact that the cheque had been credited to the customer's account exactly as if money had been deposited, and perhaps that he had been given an immediate right to draw against the credit thus established or entered. But it is no less true that these same additional points are present in the

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[118] Idem.

[119] Security Bank v. Northwestern Fuel Co. (1894) 58 Minn. 141, 59 N. W. 987. Justice Mitchell says: "Where a customer has a deposit account with a bank, on which he is accustomed to deposit cheques payable to himself, which are credited to him or his account, and against which he is authorized to draw, an indorsement "for deposit" is, in the absence of a different understanding, a request and direction to deposit the sum to the credit of the depositor, and passes the absolute title to the cheque to the bank." American Trust Co. v. Gueder Mfg. Co. (1894) 150 Ill. 336, 37 N. E. 227, holding that an indorsement "For Deposit to the credit of," and a crediting of the cheque to the depositor's account passed the legal title to the bank, the credit given being a sufficient consideration for the transfer.

An exactly similar indorsement was given a like effect in Ditch v. Western Nat. Bank (1894) 79 Md. 192, 29 Atl. 72. This decision was adversely criticized in 8 Harv. L. Rev. 180, stating that the indorsement is not absolute and does not pass the beneficial interest in the cheque until it is paid. Reliance is placed upon Dean Ames' view. This, of course, assumes the very point at issue, does or does not such an indorsement, with or without the additional fact that the depositor has been credited, indicates the intention to have been a sale or an agency to collect? The court, in this and the above cases, seems to have thought it indicated the former.

In Pennsylvania, the court without much discussion has held that upon an indorsement simply "For Deposit," the title will be considered to have vested in the bank, creating the relation of debtor and creditor. Morris v. First Nat. Bank (1902) 201 Pa. 160. In this case the depositor's account had been credited. The court said that so long as this amount remained to his credit, the bank was the owner, and the title did not revert until the cheque was returned and charged back to the debit side of the account. This apparently means that the deposit, from the out-start, was a general deposit, and not specific for collection. Accordingly, the failure of the bank thereafter would have found the bank owner of the cheque and entitled to the rights on it against the drawer, whereas the depositor could only claim for his dividend.

cases in which the indorsements were in the form of "For Collection" or "For Collection and Credit." Since different conclusions are reached, the conclusion seems inevitable that, although immediate crediting as cash seems to point strongly to a sale, certain forms of indorsement are so indicative of a purpose of agency that, irrespective of the credit given, the presumed intention to lodge the cheque only for the purpose of collection must be given precedence. But the courts have given to indorsements "For Collection" and the like an effect of that kind which they have denied to the indorsement "For Deposit." The deduction can hardly be escaped that the law does not regard them as equivalent, but accords them different treatment. The conclusion is therefore suggested that, whatever may be the soundness of Dean AMES' view that, in absence of anything else, the presumption should be that all paper received on deposit is taken for collection, when it appears that the paper has been credited to the depositor in usual course and in the same manner that cash would be credited, the presumption is rebutted and cannot be revived against these facts by the mere indorsement "For Deposit," though the weight of authority considers "For Collection" and the like sufficient for that purpose. It has already been pointed out that there is considerable justification in principle for this difference of treatment.

An intermediate view of the effect of this indorsement is found in a well reasoned case in Alabama. The decision is prefaced by a clear indorsement of the position taken by Dean AMES, in which he is also supported by the leading text writers on this subject.[120] Justice CLOFTON says, "In the absence of a special agreement, when a cheque is deposited, it is taken, generally, for collection, by the bank as agent of the depositor and the bank does not owe the amount until its collection is accomplished."[121] But the cheque in that case was indorsed "For Deposit." In considering the effect of this upon the relationship of the parties, the court continued, "The special purposes for which an indorsement for deposit is made, may be readily inferred. It was a direction and a request to the bank to deposit the sum to his credit, and conferred on it, not only the authority to collect, but also authority to put the cheque in such form, and use it in such manner, as in its judgment and discretion would make it most available to its protection. The effect of the indorsement, *for the consummation* of this purpose, is to vest the bank with the title to, and the control of the cheque. If, in such case, the cheque

[120] 2 Morse, Banking (4th Ed.) § 573 et seq.; 2 Bolles, Banking 519; Zane, Banking, 210-212 approving Beal v. Somerville (1892) 50 Fed. 647, 1 C. C. A. 598.

[121] Nat. Commercial Bank v. Miller (1884) 77 Ala. 168.

is not paid, the banker depends for safety and indemnity on the liability of the drawer and the security of the indorser."

The italics have been inserted to emphasize the limited character of the purpose for which title is regarded as passed under such a contract evidenced by this indorsement. The entire issue in the case was whether the bank was indebted to the depositor at a time when the latter's creditor garnished the bank. The bank had had the cheque certified, and the court said that as to the depositor, this was within the bank's power under such an indorsement, and amounted to payment. Consequently the bank was indebted absolutely to the customer and the garnishment was good.

This case has been taken by eminent authorities to mean that the form of indorsement passed title in the cheque to the bank at once.[122] But it is impossible to believe, after a careful examination of the opinion and the facts, that this is the proper meaning of the case. If so, why was it necessary to consider whether the debt came into existence subsequent to the deposit? If the indorsement passed title to the bank, the latter was at once indebted to its customer,[123] and the garnishment undoubtedly good. The true meaning of the case seems to be that, although an ordinary indorsement of a cheque for collection would not give the bank a right as agent to have the cheque certified,[124] the indorsement "For Deposit" gives the agent a broader authority, something more than a mere authority to collect, and allows it to use its judgment and discretion in seeking the payment, according to the necessities of its business.[125] If anything, the case is an authority in support of the view of Dean AMES.

The forms of indorsement already discussed will be found to include the principles applicable to other special forms that may be used. But frequently the paper will be placed in the bank indorsed generally or in blank. Should the presumption of law be the same as under the special forms of indorsement? Dean AMES says that it should.

This is the most doubtful case that can arise. No help can be had from the form of the indorsement, which is equivocal and gives

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[122] 2 Morse, par. 577; Mitchell, J., in Security Bank v. Northwestern Fuel Co., supra.

[123] Titus v. Mechanics' Nat. Bank (1871) 35 N. J. L. 592; Hoffman v. First Nat. Bank (1884) 46 N. J. L. 604; Terhune v. Bank (1880) 34 N. J. Eq. 367.

[124] Save by express authority, an ordinary collecting medium may not receive a certified cheque in payment. Essex Co. Nat. Bank v. Bank (U. S. 1876) 7 Biss. 193; German-American Bank v. Third Nat. Bank (1878) 18 Alb. L. J. 252.

[125] If the view of this case taken by Morse is correct, the court wasted time and argument in treating seriously the position of the contesting creditors that the procurement of certification was a tort to the customer and therefore no attachable debt arose until the tort had been waived and suit brought in assumpsit.

no evidence in itself of the intention which moved the depositor or was entertained by the bank. Whatever presumption there is must rest upon the character of the transaction stripped of everything save that a man has handed paper to his bank without stating the purpose for which it was done. Perhaps the only matter beyond doubt, is that a gift was not intended. If the law, seeking to find a solution of the difficulty in the absence of real evidence, calls it agency or bailment, it must be because, as between two men, if property is handed by one to the other not by way of gift, and no consideration appears, it is assumed to be a bailment. The weight of this analogy to sustain such a legal presumption in the case of the bank depends upon the completeness of the parallel. Is the quality of the customer's act in lodging a cheque with his banker the same as that of a man handing his watch to a friend under the above circumstances?

It is not proposed to argue this theoretically. The statement of the case itself suggests differences. But any discussion of them would be merely academic.[126] An examination of many cases confirms the belief that in all such transactions much more will appear than these bare facts. The bank will be found to have credited the depositor's account by some form of entry, or to have extended a right to draw against the amount of the cheque, or some commission will be charged, or interest, if the account bears interest, will not start to run in favor of the depositor until a later date (the actual receipt by the bank of the proceeds); and if none of these exist, some equally suggestive circumstance will appear to aid the court in determining the relationship. The practical question then is not the effect of a blank indorsement standing alone, but concerns the relative probative force of these several matters, all of which indicate the attitude of the parties on the main problem, namely, whether the transaction is a general or a specific deposit. The form of indorsement is equivocal or else bears so slightly on one side or the other that no serious argument can be drawn from it.

The mere circumstance that the depositor is permitted to draw against the cheque handed to the banker, before the proceeds are actually collected, is not sufficient to indicate that the title to the cheque has passed to the bank.[127] This is perfectly consistent with

[126] The editor of the case note in 32 L. R. A. N. S. 694, takes the position that under a blank indorsement the title prima facia passes. But even then, this is qualified by adding that it has been passed to the credit of the depositor. In all the cases collected in this note many additional facts appeared.

[127] Winchester Milling Co. v. Bank of Winchester (1907) 120 Tenn. 225, 111 S. W. 248; Balback v. Frelinghuysen (1883) 15 Fed. 675; Interstate Nat. Bank v. Ringo (1905) 72 Kans. 116, 83 Pac. 119, 123; In re State Bank (1893) 56 Minn. 119, 57 N. W. 336.

the retention of title by the customer and, in effect, is a mere borrowing from the bank on the security of the paper until the collection is made. For the advances made the bank is protected by the personal liability of the depositor for money loaned and by its lien on the paper.[128]

The effect of charging a commission for making the collection is reasonably clear, and is sufficient to show, unless strongly counterbalanced by other evidence, that the deposit was merely for collection.[129] The same is true when evidence is produced which shows that, if the account bears interest, it does not start to run until a date subsequent to the receipt of the paper, that is, the time at which the proceeds are actually received.[130] A like effect is given to the circumstance that, until the funds are collected, the bank charges interest to the depositor for the credit which has been made in his account.[131]

The condition most frequently found is the immediate passing of the cheque or other paper to the credit of the customer. In other words, it has been treated exactly as if the subject of deposit were cash, credit being given in the pass-book and on the bank's own books without distinction.[132] Although this is subject to explanation from the settled course of dealing between the parties, or from a special agreement that despite this fact the paper is taken only for collection,[133] yet there seems to exist a preponderance of authority holding that this transaction amounts to a sale of the paper to the bank. This is the well settled rule in New York by a long line of decisions,[134] in Maryland,[135] in Indiana,[136] New Jersey,[137] Georgia[138]

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[128] Giles v. Perkins (1807) 9 East 12; In re State Bank, supra; Paley, Agency 91 n; Story, Agency, par. 228.

[129] Shipsey v. Bowery Nat. Bank (1875) 59 N. Y. 485.

[130] Thompson v. Giles, supra.

[131] St. Louis etc. Ry. Co. v. Johnston (1889) 133 U. S. 566, per Chief Justice Fuller, "The practice, well understood, of the bank charging exchange and interest for the time taken in collection, was not consistent with the theory of an understanding between the bank and the customers that the title to this and similar drafts should pass to the bank."

[132] When the entries of paper and of cash are made in different manner, the case is clear. The distinction thus made will usually be sufficient to indicate that the cheque was received as paper and so treated with respect to the account. It is therefore regarded as taken only for collection, unless strong circumstances to the contrary appear, as long course of dealing or special understanding. Thus if the credit is entered "subject to payment" it is not a sale. First Nat. Bank of Wellston v. Armstrong, Recr. (1890) 42 Fed. 193. Or if, although entered in the cash column, it is entered as paper. Rowton's Case (1810) 1 Rose 15 (entered as short bills); Buchanan's Case (1812) 1 Rose 280; Montgomery County Bank v. Albany City Bank (N. Y. 1852) 3 Seld. 459.

[133] St. Louis etc. Ry. Co. v. Johnston, supra (long settled course of dealing).

[134] Briggs v. Central Nat. Bank (1882) 89 N. Y. 183; Metropolitan Nat. Bank v. Loyd (1882) 90 N. Y. 530; King v. Bowling Green Tr. Co. (1911) 129 N. Y. S. 977; Jaffe v. Weld (1911) 132 N. Y. S. 505; Brooks v. Bigelow (1886) 142 Mass. 6, applying

and Illinois,[139] and the same may be correctly said of other states.[140] In the Federal Courts there has been at times some uncertainty and change in view. There is no doubt that it is properly regarded as a matter of intention, but in the absence of anything to indicate reasonably the intent, the rule now seems established in the United States Supreme Court in accord with the authorities already mentioned.[141] The United States cases have been followed in Kansas.[142]

On the other hand, a few jurisdictions seem to be committed to the opposite view. The stress in these courts is laid, not upon the treatment of the deposit as one of cash, but, admitting the force of that fact, another circumstance usually found to exist is considered conclusive, namely, that the bank is accustomed to, and always does, exercise the right to cancel the credit given in the account, if the cheque is unpaid without fault on the part of the bank or its agent.[143]

New York law. Justice Andrews, in Craigie v. Hadley (1885) 99 N. Y. 131, 133, "The general doctrine that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or of drafts, or of cheques received and credited as money, the title to the money, or to the drafts or cheques, is immediately vested in and becomes the property of the bank, is not open to question."

[135] Tyson & Rawls v. Western Nat. Bank (1893) 77 Md. 416, 26 Atl. 521; "When a cheque, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds are credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement." This is followed in Ditch v. Western Nat. Bank (1894) 79 Md. 192; First Denton Nat. Bank v. Kenney (1911) 116 Md. 24, 81 Atl. 227 (doubtful if the point was necessary to the decision).

[136] Wasson v. Lamb (1889) 120 Ind. 514, 22 N. E. 729; Downey v. Nat. Exchange Bank (Ind. 1911) 96 N. E. 403.

[137] Titus v. Mechanics' Nat. Bank (1871) 35 N. J. L. 588; Hoffman v. First Nat. Bank (1884) 45 N. J. L. 604.

[138] Fourth Nat. Bank v. Mayer (1891) 89 Ga. 108 (obiter); Cf. Freeman v. Exchange Bank (1891) 87 Ga. 45, 13 S. E. 160.

[139] American Trust Co. v. Grueder Mfg. Co. (1894) 150 Ill. 336, 37 N. E. 227 (obiter); Doppelt v. Nat. Bank of Republic (1898) 175 Ill. 432.

[140] Brown v. Peoples' Bank (1910) 59 Fla. 163, 52 So. 719; Security Bank v. Northwestern Fuel Co. (1895) 58 Minn. 141, 59 N. W. 987 (obiter); Williams v. Cox (1896) 97 Tenn. 555, 37 S. W. 282; First Nat. Bank v. Dickson (1889) 6 Dak. Terr. 301, 50 N. W. 124.

[141] Burton v. United States (1904) 196 U. S. 283, 297, "In the absence of evidence of a particular contract between the parties, it was error to submit the question to the jury whether the result of the transaction of deposit was a debt or an agency relation. The law fixes such a transaction as creating the relation of debtor and creditor." In so far as Balbach v. Frelinghuysen, and Beal v. Somerville, supra, are contrary to this case, they can no longer be considered law. It was there held that in the absence of special circumstances, the blank indorsement, with crediting, did not pass title to the bank.

[142] Noble v. Doughton (1905) 72 Kan. 336.

[143] This is the view in Balbach v. Frelinghuysen, and Beal v. Somerville. It is also held to be conclusive in Armour Packing Co. v. Davis, Recr. (1896) 118 N. C. 548, Clark, J., saying, "It is found that the tacit agreement between the parties from the course of their dealings, was that, though the amount was credited to the depositor and he could draw against it, yet, if the paper so deposited was not paid on presentation, the amount thereof was to be charged to the depositor's account or taken off his next

Thus, in Minnesota for example, the current authority is followed where there appears no right to charge back an unpaid cheque, but where that is the bank's right, either through custom or course of dealing, it is regarded as sufficient to prevent the construction of the contract that the title has passed. While it is true that the latter point is mere *obiter,* since in that case the contract appearing on the deposit slip was entirely sufficient to show that title was not intended to pass, the position is not unsustained by respectable authority.[144]

There is no doubt, and no one disputes, that if the parties understand that it is only intended by the indorsement to put the paper in such shape that the bank can collect it, the title does not thereby pass to the bank. The difficulty is, what circumstances and conduct can be relied upon to show their understanding? In one case it has been said, if their intention is to retain title, it should be shown by indorsing the paper "For Collection."[145] But here the indorsement is equivocal, and in such case the weight of authority considers the credit as cash to indicate the contrary. Does the right to recharge the account suffice, not only to counterbalance the treatment as cash, but to show the understanding to be that it is taken merely for collection? Upon this there seems to be an irreconcilable conflict of authority. The difficulty cannot be solved by saying it is a question of fact. That is true, but the facts are here known and the problem is no nearer solution than before. Bare facts are left by the parties, and from them, as in the analogous case of a sale of chattels, the law must ascertain their intentions. What evidential effect upon that issue has the right to cancel the credit? The Supreme Court of the United States, denying the authorities already cited, has positively stated that it has no effect.[146] The indorsement being general, the cheque credited and treated as cash, the title passes, and the right to cancel the credit should it remain unpaid, "is simply a method pursued by a bank of exacting payment from an indorser of a cheque and nothing more." This statement is fully approved and applied in a recent Kansas case.[147]

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deposit ticket." This stamps the transaction as being unmistakably a bailment for collection. The Minnesota court has also considered the right to cancel the credit given on the unpaid cheque as inconsistent with the idea that title passed to the bank, and as consistent only with the theory that the bank is the agent for collection, notwithstanding the credit to the depositor. In Re State Bank, supra, a different result was reached by the same court, where no such right appeared, in Security Bank v. Northwestern Fuel Co., supra.

[144] 2 Morse, Banking (4th Ed.) § 586; Zane, Banking, § 133.

[145] Hoffman v. First Nat. Bank, supra.

[146] Burton v. United States, supra.

[147] Noble v. Doughton, supra, The right is "the right of an indorsee against an indorser and hence not in any sense inconsistent with ownership."

An examination of numerous cases discloses but these few decisions upon this exact point, and as noted, the conflict is irreconcilable. Perhaps the paucity of authority can be explained when it is considered that the prevalent practice of banking institutions is not summarily to charge the account of the depositor with the unpaid cheque, nor high-handedly to deduct the amount from his next deposit, but to call upon him to draw a cheque for the amount in favor of the bank which is then used to adjust the matter as well as being good evidence of its disposition. The depositor is then entitled to receive the dishonored cheque, to proceed as he thinks best. The effect of this custom seems not to have been judicially determined, but it appears to be wholly consistent with passage of title to the original cheque to the bank of deposit. The consideration for the credit to the depositor having failed, the bank thus requests restitution from him by way of the second cheque, in effect voluntarily cancelling the credit by agreement.

Of course, the bank, considered as owner of the dishonored cheque, might give due notice to the depositor as an indorser, and sue him as such. Does the custom which exists, as in the North Carolina case, go any further than to show that, by well recognized usage, the depositor has impliedly consented to dispense with formal notice of dishonor and the necessity of an action to enforce his liability? If that is the proper bearing of the custom it is giving it undue weight to hold it an unsurmountable obstacle to the ownership of the cheque by the bank. In this view there is in this custom nothing inconsistent with the passage of property in the cheque to the bank from the moment it was handed over the counter.[148]

It is possible now to summarize briefly the general result of the cases. In the absence of special agreement or prevailing custom, an indorsement in blank standing alone is equivocal, and, if nothing more appeared, the attempt of the court to ascertain the parties, intentions would be a mere guess. But surrounded as it always

[148] Attention is directed, without further discussion, to certain English cases under the Crossed Cheques Act. The protection of that Act depends upon whether the bank in receiving the proceeds of a cheque crossed to it, receives payment for the customer who deposited it.

The rule seems to be that if the cheque is taken, indorsed in blank, and regularly credited to the customer's account, against which he is entitled to draw, the subsequent collection by the bank is not a receipt of payment for the customer. Capital and Counties Bank v. Gordon [1903] A. C. 240; Clarke v. London and County Banking Co., [1897] 1 Q. B. 552; Akrokerri Mines v. Economic Bank [1904] 2 K. B. 465; Bevan v. National Bank, Ltd. (1906) 23 Times L. R. 65.

It is suggested, rather than here contended, that whatever the real solution, these cases, though apparently so, are not opposite to the problem here considered. Compare, however, the opinion of Jessel, M. R., in Ex parte Richdale (1882) 19 Ch. D. 409; and upon that authority, Royal Bank of Scotland v. Tottenham [1894] 2 Q. B. 715.

is with other circumstances, it becomes an intelligible problem. If no commission is charged, and no matters concerning interest appear tending strongly to show the contrary, the entry of cheques upon other banks received under such an indorsement, to the credit of the depositor's account in the exact manner of cash deposits, will *prima facie* indicate that the parties intended the cheque to pass into the ownership of the bank, and the deposit to be general. And the mere fact that there exists a right to cancel the credit given, if the cheque is dishonored without fault of the bank or its agents, is, by the weight of authority, and perhaps upon principle, not inconsistent with that result. The consequence of this is that after such a deposit the failure of the bank compels the depositor to come into the insolvency proceedings like any other general creditor.[149]

Enough has now been said to make it apparent that conflicting ideas of the problems here involved are largely responsible for the great confusion in the cases. It is hoped that the discussion has at least made this much clear, that the definite issue is whether the deposit (whether of money or of paper) creates between the bank and its customer the relation of debtor and creditor, or on the other hand, of agent and principal or bailee and bailor; and that it is impossible for the bank, with respect to the same subject-matter of deposit, to be both debtor and agent of the depositor at the same time. The two relations are mutually exclusive, and the consequences of one make impossible the consequences of the other. It has been the failure to adhere faithfully to these truths, and to keep carefully separated the consequences of the two relationships, that has led to a condition of the law that is justly characterized by Mr. ZANE as "hopelessly irreconcilable."

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[149] No reference is made in the text to deposits of paper in a bank then known by its officers to be insolvent. Numerous cases hold that a cheque so deposited may be reclaimed by the depositor. But there is no inconsistency in this with the authorities which hold that paper generally indorsed, and credited to the depositor's account, passes into the ownership of the bank. The former rest solely upon the principle that it is fraud upon the part of an insolvent bank to receive a general deposit and make itself a debtor. This fraud vitiates any contract which would accomplish that result when the depositor was unaware of the condition. Wasson v. Hawkins (1894) 59 Fed. 233; First Natl. Bank v. Strauss (1889) 66 Miss. 479; Craigie v. Hadley (1885) 99 N. Y. 131; Klepper v. Cox, 97 Tenn. 534, 37 S. W. 284.

The depositor must, of course, identify his property in specie or in its converted form, otherwise he cannot be preferred.